Introductory remarks prepared for the Centre for Native Title Anthropology's annual conference to be held at Queen's College, University of Melbourne, on 'Innovation in Native Title Anthropology' from the 8th to 9th February 2018

Innovation and native title

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The Oxford English Dictionary definition of 'innovation' includes as a core meaning: 'the alteration of what is established'. But an older obsolete meaning included 'revolution' which has, perhaps, some affinity with the current understanding of innovations as being disruptive in what is frequently interpreted as a positive sense.

In considering innovation in relation to native title it is important to keep in mind that everything about native title is innovative, relative to the pre-colonial situation. However, the language associated with the Native Title Act (1993) which uses words and phrases such as, laws and customs, traditional lands (preamble), rich and diverse culture, and rights and interests at sovereignty tends to obscure that. Even in the ideal native title claim where it is absolutely clear that there was exclusive possession at sovereignty, where the connection with the past is unbroken and where the people today are exercising all their original rights and interests, the implication is that recognition is being given to how relations to land were before non-Aboriginal people arrived. This is, of course, a fiction. The actual restoration of the territorial situation at sovereignty is not only impossible, even in the remotest areas of the country, but undesired by anybody. For instance, the killing of people for breaches of tradition in relation to sacred sites is just one example of an important aspect of past relationships with land that nobody wishes to revive.

Further, no Aboriginal people are likely to want to return to a life dependent on hunting and gathering, and even if they did the ecology has often been changed through the decimation of indigenous species, the countryside being

invaded by weeds and feral animals, and by depopulation that means there is an absence of the full network of social relations that allowed people to move to other areas if there were local shortages. Even more consequentially all Aboriginal people, like the rest of us, are now locked into consumer dependencies that can only be satisfied with money.

Formal return to the original situation is also impossible for other reasons including: the fuzziness of traditional boundaries which cannot work in a market economy, and the complexity of Aboriginal rights and interests in land that are difficult, if not impossible, to accurately mirror in legislation. There are also foundational aspects of our culture and political life such as fairness, democracy, the rule of law, and an independent judiciary which all complicate the situation.

So, if the restoration of the situation at sovereignty is not only undesired but impossible, everything encompassed within the native title regime involves an alteration of what was established pre-sovereignty, although it does build on the pre-sovereignty situation. In some domains, however, there was nothing appropriate to build on. Specifically, there was nothing in respect of governance that could be directly related to the governance requirements of land-owners in the 21st century. Hence, we have the complex apparatus of Representative Bodies, and Prescribed Bodies Corporate (PBCs), and the involvement of lawyers, anthropologists and others in the design and creation of institutions of governance to bridge the gap between what existed and worked pre-1788 with what is essential in 2018.

Bridging this gap in native title, as well as many other area, has resulted in the proliferation of corporations so that there are now more than 4000 of them.

If then, the restoration of land so that it can be used in pre-sovereign ways is impossible and anyway not of concern as no one wants to pursue the old way of life that it under wrote, and if new institutions of governance are required, it raises the question as to whether we could have done better in the way we have gone about recognising native title.

It is, of course too late now to think in terms of a tabula rasa with 25 years of native title recognition, legislation and policy development under our belt. But if we had wanted to design a better scheme of land justice could we have done so? For instance: would it have been possible to ignore original pre-sovereignty arrangements? In settled Australia these had largely disappeared in all their specificity and complexity, although not, of course, people's attachment to localities and regions. To the extent that remnants of the old systems had survived in places in settled Australia down to the 1970s, they were becoming weaker with each generation.[1] This decline was radically halted, and indeed reversed, from the 1970s first by land rights legislation and more strongly by native title. There have been both positive and negative consequences of this, and it is one of the negative consequences that I wish to briefly raise.

A, if not the, principal problem with native title recognition is that at the very moment that it recognises some Aboriginal people in a locality, as traditional owners, it creates others living in the same locality as landless. In theory, these landless people have rights somewhere else but the fact that in many cases these other people have for 2-4 generations been living side by side with those recognised as local traditional owners, usually means they have lost most or all meaningful connection with their original homeland. Often this move from their original country was imposed on people by the government making unilateral decisions to move them. Alternatively, such people's original homeland may have been permanently alienated. In the negotiations around the Native Title Act some recognition of these problems was given and as a consequences the land fund was established to help meet these kinds of situations.

We now have several accounts of the problem created by native title in settled Australia. Gaynor Macdonald has described the conflicts created in central NSW for people, and organisations, and more recently Eve Vincent has presented a personalised account of the impact on one person and her identity in her very readable book, 'Against native title'.

It is interesting to speculate whether the underlying problems could have been avoided at the outset of the negotiations over native title. In a sense it was hoped that they would be with the creation of the land fund, but because the thinking around native title was driven by legal thinking from the presentation of the Mabo case onwards it may have been difficult to overcome the creation of landless people, although perhaps there was an opening in the Mabo decision, which said the people of Murray Island held the Island as against the whole world, when what they had originally filed for was only the recognition of plots of land belonging to five 'families'. Of course, this would have rested on several things including how the term 'people of Murray island' was interpreted.

Relationships to land are only going to get more complicated. The 2016 census shows that there has been a very high growth in the Indigenous population count in the urban parts of the country with three regions, Brisbane, the NSW central and north coast and the Sydney-Wollongong areas in particular adding nearly 50,000 people (Markham and Biddle 2017:19), many of whom are new identifiers with one parent born overseas: that is to say that the levels of intermarriage with non-Indigenous Australians that have been rising over the last three decades, are now having a marked impact on the composition of the Indigenous population and its social indicators. It seems inevitable that this trend is going to pose challenges to both native title holders and local and regional social relations within Indigenous communities.

I do not believe that there is any radical innovation in respect of native title that is likely to be able to satisfactorily meet the problem splitting local populations, although I could be wrong and I would be very happy to be so. But I do think that that the move towards state or regionally based treaties offers some possibilities.

I think that if, in respect to treaties all the Aboriginal permanent residents of a region/state were included in some way, some of the divisiveness created by native title could be partly overcome. There is not time to explore all the issues this suggestion raises here, ranging from the relationship between native title holders and this category of people and how a permanent resident

of a region/state is to be defined, but I think that strong leadership from within the Indigenous community but particularly, from those with recognised native title rights, could overcome the difficulties, to the great benefit of all.

But within the overarching structure of native title that has had many benefits, despite its problems, I return to my original point, we all, both Indigenous claimants and those of us working for native title, are involved in a vital and innovative social policy that requires continuous innovation to a lesser or greater degree from us all, in order to maximise its benefits for Indigenous people and at the same time to improve the situation for all citizens. A good example of innovation is right here in Victoria in the way that Native Title Services Victoria is repositioning itself by changing its name to First Nations Legal and Research Services, to be better able to respond to the developing needs of its Traditional Owner clients.

So, we come to our conference. In our keynote speakers, we have three very well informed and innovative thinkers in relation to native title. Mike Dillion brings a huge experience of innovation not just from working for Aboriginal organisations, but more influentially from working at the heart of policy making in the cauldron of bureaucratic and political life when he was an adviser to Jenny Macklin. John Morton, building on his extensive experience as a native title consultant anthropologists, is offering us innovative ways of addressing issues of transformation in social organisation in relationship to how native title claims can be presented in settled Australia. And Sarah Maddison, a political scientist, who will bring her rich long-term comparative interest in settler states and reconciliation to bear on thinking about the possibilities that treaties and treaty arrangements of various kinds offer for the future. We have much to look forward to.

References

Macdonald, G. 1997. Recognition and justice: the traditional/historical contradiction in New South Wales. In Fighting over country: anthropological perspectives (eds.) D. Smith and J. Finlayson. Canberra: CAEPR Research Monograph No. 12. Pp.65-82.

Markham, F and Biddle, N. 2017. Indigenous population change in the 2016 census. Canberra: CAEPR, Census 2016 Paper No 1.

Peterson, N. 1996. Cultural issues. In The 1994 National Aboriginal and Torres Strait Islander survey: findings and future prospects (eds.) J. Altman and J. Taylor. Canberra: CAEPR Research Monograph No. 11. Pp.149-155.

Vincent, E. 2017. Against native title: conflict and creativity in outback Australia. Canberra: Aboriginal Studies Press.

[1] In the 1994 NATSIS survey 59.8% of respondents did not identify with a clan, tribe or Aboriginal language group (see Peterson 1996:152).